

irrational in the long run absent the exclusion of a competitor, long-run package discounting may be a perfectly rational business strategy without regard to any competitor's demise."⁶³

While bundled discounts are meant to increase sales and, presumably, market position, there is nothing anticompetitive about such efforts to expand one's own output. "To be sure, the firm that offers the lowest quality-adjusted price may 'foreclose' competitors from obtaining business from customers, and customers will naturally choose to deal exclusively with the firm offering the lowest quality-adjusted price. But that is true of any form of legitimate price competition –the firm offering the lowest price gets the business."⁶⁴ As Areeda and Hovenkamp put it:

Of course, higher output injures rivals, because less of the market remains for them. But to protect rivals from a firm's output-increasing strategies puts competitors ahead of consumers.... Bundling explained by ... scale economies is 'exclusionary' only in the quixotic sense that any practice that increases a seller's output is exclusionary. If this firm sells more, then very likely someone else is selling less.⁶⁵

In addition to increasing the discounting firm's output, bundled discounts increase overall welfare. "[A]bove-cost package discounting brings immediate social gains by driving prices toward marginal cost. Further, any risk of future harm is remote."⁶⁶ Thus, "[d]iscounting in response to competitive pressures is exactly the sort of behavior we *hope* antitrust law will

⁶³ *Multiproduct Discounting* at 41.

⁶⁴ *Id.* at 47.

⁶⁵ AREEDA & HOVENKAMP ¶ 749 at 264-65. As another commentator puts it, "because procompetitive conduct ... can weaken rivals, weakening rivals is not by any means sufficient to condemn [even] a monopolist's conduct." Daniel L. Rubinfeld, *3M's Bundled Rebates: An Economic Perspective*, 72 U. Chi. L. Rev. 243, 262 (2005) ("Economic Perspective").

⁶⁶ *Multiproduct Discounting* at 42.

engender.”⁶⁷ This is true even with respect to actual monopolists. Indeed, “perhaps most strongly for monopolists that lack market discipline on their prices, it is very important not to have legal rules that deter price discounting.”⁶⁸

In sum, volume, term, and package discounts are commonplace elements of pricing structures in all markets, and the discounts that Qwest offers for its special access services are reasonable responses to its legitimate needs to recover its investments and retain usage levels on its network.

III. IN QWEST’S REGION, INDUSTRY CONSOLIDATION HAS STRENGTHENED, NOT ELIMINATED, COMPETITORS IN THE HIGH-CAPACITY TRANSMISSION MARKET.

In response to questions in the *Public Notice*, several parties claim that the recent mergers between Verizon and MCI, SBC and AT&T, and AT&T and BellSouth have reduced competition in the high-capacity transmission market.⁶⁹ Indeed, many of the arguments commenters make throughout their comments, on inspection, rely heavily on these mergers. T-Mobile claims that “[w]hatever discipline” AT&T and MCI exerted “disappeared when these mergers were completed,”⁷⁰ while BT Americas claims that the BOCs are not “actual or potential competitors in each other’s regions.”⁷¹ The American Petroleum Institute asserts a list of grievances specifically aimed at AT&T, from which it somehow concludes that “[a]ll price cap

⁶⁷ *Multiproduct Discounting* at 43 (emphasis added). See also *id.* at 42 (“Conduct producing immediate and definite social gains and only speculative long-term social losses under narrowly defined conditions does not deserve its own ‘[unlawful] exclusionary conduct’ subcategory.”); MASSIMO MOTTA, *COMPETITION POLICY: THEORY AND PRACTICE* 467 (Cambridge Univ. Press 2004).

⁶⁸ *Economic Perspective* at 262.

⁶⁹ See, e.g., Ad Hoc Comments at 15-21; XO *et al.* Comments at 35-41; Sprint Nextel Comments at 36-39; ATX *et al.* Comments at 17-23

⁷⁰ T-Mobile Comments at 3.

⁷¹ BT Americas Comments at 7; see also *id.* at 19.

ILECs should be required to roll back [rates].”⁷² *XO et al.* even go so far as to argue that there is now a “national market for special access services” that is “dominated” by the “duopoly” of Verizon and AT&T.⁷³

These arguments are vastly overstated. Whatever impact recent mergers may have had elsewhere, it is crucial to note that they actually served to *strengthen* the facilities-based wireline competitors in Qwest’s region. Unique among BOCs, Qwest now faces in-region special access competition from two other carriers that are substantially larger and better-capitalized than Qwest itself. This competition only supplements the substantial competition that Qwest also faces from resellers and intermodal competitors.⁷⁴

Prior to the recent mergers, Qwest faced competition from MCI and the pre-merger AT&T, in addition to smaller facilities-based competitive LECs, resellers, and rapidly growing intermodal competitors. While MCI and legacy AT&T were formidable competitors, they were not nearly as significant as Verizon and AT&T, which are now two of the largest corporations in any industry in the world. Thus, the impact of the recent mergers has been, in Qwest’s territory, to *increase* the strength of facilities-based competitors to the incumbent LEC in the high-capacity transmission market. While Qwest in no way endorses XO’s characterization of the market in *any* region, it emphasizes here that any regulatory changes that the Commission may make in this proceeding must take account of the fundamentally different competitive situation that prevails within Qwest’s region.

⁷² American Petroleum Institute Comments at 8 (emphasis added).

⁷³ *XO et al.* Comments at 41.

⁷⁴ *See* Qwest Comments at 27-39.

The lack of merger activity in Qwest's region is also relevant in more subtle ways. Some commenters point out, for example, that the mergers have eliminated collocated competitors in many MSAs in AT&T and Verizon territory such that pricing flexibility would not be granted if the inquiry were undertaken today.⁷⁵ Others argue that economies of scale from the mergers should have resulted in lower special access prices.⁷⁶ Since Qwest has not been involved in a major merger since it received pricing flexibility, however, none of these arguments apply to Qwest.

In sum, the impact within Qwest's region of recent mergers has been antithetical to the impact elsewhere. Qwest now faces stronger facilities-based competitors for its special access services. If anything, the recent mergers present a strong case for providing Qwest with additional flexibility in its special access pricing. In all events, the Commission must not take action based on a presumption that market conditions in Qwest's territory mirror those in the territories of other BOCs.

IV. PARTIES' OTHER POLICY ARGUMENTS ARE MISGUIDED.

A. Commenters' Arguments Regarding Broadband Deployment Turn the Commission's Precedent on its Head.

Various commenters attempt to tie their calls for pervasive rate regulation to the allegedly salutary effect that such regulation will have on the provision of broadband service to end users.⁷⁷ No doubt, these parties hope to appeal to the Commission's well-placed focus on broadband deployment. In their zeal to dress calls for stultifying regulation in more attractive

⁷⁵ See, e.g., T-Mobile Comments at 12-14.

⁷⁶ See, e.g., ATX *et al.* Comments at 19-21.

⁷⁷ See, e.g., T-Mobile Comments at 2; Sprint Nextel Comments at 35-40.

garb, however, they have failed to notice that their policy prescriptions are directly contrary to the Commission's precedent in this area. That precedent makes clear that price controls depress infrastructure investment and thus inhibit broadband deployment. Qwest agrees that the Commission should remain focused on broadband, but urges the Commission to stick with its proven strategy for expanding deployment by rejecting calls for pervasive regulation.

In recent years, beginning with *TRO*,⁷⁸ the Commission has established a deregulatory approach to broadband networks intended to promote investment by incumbent providers and competitors alike. At the heart of this regime lies the recognition that artificial price controls deter investment in network infrastructure and ultimately harm consumers.⁷⁹ This principle extends not only to TELRIC rates, but also to the "just and reasonable" rate requirement that governs in many other regulatory contexts⁸⁰ and to the *Computer Inquiry* network sharing requirements as well.⁸¹ Thus, the Commission has relieved incumbents of requirements that had

⁷⁸ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 18 FCC Rcd 16978 (2003) (subsequent history omitted) ("*TRO*").

⁷⁹ See, e.g., *Wireline Broadband Order*, 20 FCC Rcd at 14877-78, para. 44. See also *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 19 FCC Rcd 15856, 15857-58 ¶ 4 (2004); *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 19 FCC Rcd 20293, 20295 ¶ 5 (2004); *TRO*, 18 FCC Rcd at 17145 ¶ 278.

⁸⁰ *Broadband 271 Forbearance Order*, 19 FCC Rcd at 21505 ¶ 21. As the D.C. Circuit recognized in upholding the *Broadband 271 Forbearance Order*, the Commission's decision provided "incentives for both ILECs and CLECs to invest in and deploy broadband facilities, which will increase competition going forward and thereby keep rates reasonable, benefit consumers, and serve the public interest." *EarthLink*, 462 F.3d at 7.

⁸¹ See *Wireline Broadband Order*, 20 FCC Rcd at 14865 ¶ 19.

the effect of regulating rates for services used in the ultimate provision of broadband to end users.

This policy framework has been immensely successful, notwithstanding allegedly supracompetitive special access rates. According to Commission statistics, there were 23.5 million high-speed lines in service nationwide at the end of June 2003.⁸² By mid-2006, there were 64.6 million such lines – more than two-and-a-half times as many.⁸³ This growth has been widely spread among competing platforms.⁸⁴ Claims that special access rates have limited the provision of wireless broadband service are particularly unpersuasive: about 48 percent of all growth in the number of all broadband Internet access lines in the year between June 2005 and June 2006 was attributable to mobile wireless services.⁸⁵ While there were just 379,536 high-speed mobile wireless lines in June 2005, there were over *11 million* such lines just one year later.⁸⁶

Given the great success of the Commission's broadband policy framework, and the fact that this framework is premised precisely on the *rejection* of intrusive rate regulation, claims that

⁸² Report, *High-Speed Services for Internet Access: Status as of June 30, 2003*, Industry Analysis and Technology Division, Wireline Competition Bureau, FCC, at Table 1 (rel. Dec. 2003) ("*June 2003 Report*").

⁸³ Report, *High-Speed Services for Internet Access: Status as of June 30, 2006*, Industry Analysis and Technology Division, Wireline Competition Bureau, FCC, at Table 1 (rel. Jan. 2007) ("*June 2006 Report*").

⁸⁴ The number of cable broadband lines more than doubled, from 13,684,225 lines in June 2003 to 28,513,500 in June 2006. The number of xDSL lines has almost tripled, from 8,890,827 lines in June 2003 to 23,523,170 million lines in June 2006. And the number of fiber-optic lines has grown from 111,386 subscribers in June 2003 to 700,083 in June 2006. See *June 2003 Report* at Table 1; *June 2006 Report* at Table 1.

⁸⁵ See *June 2006 Report* at Table 1.

⁸⁶ See *id.*

such regulation is essential for the continued expansion of broadband service should promptly be rejected.

B. Wireless Providers Cannot Be Heard to Argue For Extensive Economic Regulation

In this proceeding, where it may benefit them, the unaffiliated wireless carriers advocate a return to a more heavily regulated paradigm for special access pricing, and the elimination of the limited pricing flexibility that incumbent LECs have received. Their advocacy here contrasts sharply, however, with their positions in other proceedings – particularly those involving the regulation of their own rates.

When confronted with regulation of its own roaming rates and arrangements with smaller wireless carriers, for example, Sprint Nextel very aptly pointed out that rate regulation would “contradict Congress’ directive that the Commission ‘promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers.’”⁸⁷ T-Mobile took a similarly de-regulatory position in that proceeding.⁸⁸ In the Commission’s recent proceeding to define the parameters for the upcoming auction of licenses in the 700 MHz band, smaller potential auction participants had argued that regulatory restrictions should be imposed upon larger incumbent wireless carriers such as T-Mobile. T-Mobile opposed such restrictions, however, stating that “[e]ligibility restrictions on wireless incumbents run

⁸⁷ Comments of Sprint Nextel Corporation, *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, WT Docket No. 05-265 (filed Nov. 28, 2005) at 2 (*quoting* Preamble, Telecommunications Act of 1996, Public Law 104-104, 100 Stat. 56 (1996)).

⁸⁸ Comments of T-Mobile USA, Inc., *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, WT Docket No. 05-265 (filed Nov. 28, 2005).

counter to the Commission's long-standing policy of relying on market forces to shape the development of wireless services."⁸⁹

The Commission's special access pricing flexibility rules are part of the same deregulatory trend that resulted in the light regulatory touch that prevails today in the wireless industry.⁹⁰ It is a highly successful model which the Commission should not forsake in any of these proceedings.

C. There Is No Basis For Limiting the Geographic Scope of Pricing Flexibility.

Contrary to T-Mobile's suggestion, there is no basis on which to "[s]ignificantly limit the size of the geographic area eligible for pricing flexibility."⁹¹ In adopting pricing flexibility, the Commission concluded that MSAs best represent the area over which competitors are likely to enter⁹² – that is, that competitors will enter on a market-by-market basis. Significantly, the Commission rejected calls to adopt a smaller geographic area, because the existing triggers "are sufficient to ensure that competitors have made sufficient sunk investment with an MSA."⁹³ The Commission also concluded that a more granular analysis could not be justified in light of the "increased expenses and administrative burdens" it would entail.⁹⁴

⁸⁹ Reply comments of T-Mobile USA, Inc., *Service Rules for the 698-746, 747-762 and 777-792 MHz Bands*, WT Docket No. 06-150 (filed June 4, 2007) at 5.b

⁹⁰ These parties may argue that the special access market is less competitive and therefore different, but the only areas at issue here are those where competition has been demonstrated through fulfillment of the pricing flexibility triggers.

⁹¹ T-Mobile Comments at 12.

⁹² *Pricing Flexibility Order*, 14 FCC Rcd at 14260-01 ¶¶ 72-76.

⁹³ *Id.* at 14260 ¶ 74.

⁹⁴ *Id.*

In light of the falling prices and quickening competition revealed in this record, there is no reason for the Commission to develop a more granular or more stringent test for pricing flexibility than the existing pricing flexibility triggers.⁹⁵ The *Pricing Flexibility Order* set extremely high standards for incumbent LEC pricing flexibility; otherwise, the price cap rules continue to prevail.⁹⁶ The GAO Report questioned these tests' ability to determine competitive options for individual customers,⁹⁷ but the report also is suspect because it gave very short shrift to rapidly growing intermodal alternatives,⁹⁸ and did not consider incremental burdens that revised market definitions would impose on carriers or the Commission.⁹⁹ Moreover, there is no contradiction between reliance on wire-center-specific unbundling triggers and MSA-specific pricing flexibility triggers. These different and overlapping regimes work in concert, maintaining investment incentives while ensuring that if competitors are unable to self-provision or to obtain third-party transmission in certain wire centers within a pricing flexibility MSA, they will be able to compete in those wire centers using UNEs. In short, on the current record, there is no basis for making the pricing flexibility tests any more onerous.

⁹⁵ See GAO Report at 43.

⁹⁶ For Phase I relief, incumbent LECs must show collocation in at least 50 percent of wire centers (or wire centers representing 65 percent of revenue in the MSA) for channel terminations between a LEC end office and an end-user customer, or for other special access services, collocation in 15 percent of wire centers (or wire centers representing 30 percent of revenue). For Phase II relief, incumbent LECs must show collocation in fully 65 percent of wire centers (or wire centers representing 85 percent of revenue) for channel terminations, and 50 percent of wire centers (or 65 percent of revenues) for other special access services. *Pricing Flexibility Order*, 14 FCC Rcd at 1414234-35 ¶¶ 24-26.

⁹⁷ GAO Report at 43.

⁹⁸ See *id.* at 42.

⁹⁹ AT&T correctly notes a number of shortcomings in the GAO Report. See AT&T Comments at 52-57.

D. There Is No Basis For Special Requirements Governing Wireless Cell Site Links.

Sprint and T-Mobile both contend that the pricing flexibility triggers are not probative with respect to links to or between wireless cell sites and/or base stations, because these sites are not located within the incumbent LEC's network and will not benefit from existing fiber-based collocation at incumbent LEC central offices.¹⁰⁰ These arguments, however, only underscore the fact that price regulation would be especially inappropriate with regard to these links.

First, as Qwest detailed in its initial comments, the Commission has found that incumbent LECs have no advantage over competitors in the construction of high-capacity facilities on new routes. In these "greenfield" scenarios, "the entry barriers appear to be largely the same for both incumbent and competitive [providers] – that is, both incumbent and competitive carriers must negotiate rights-of-way, ... obtain fiber optic cabling and other materials, develop deployment plans, and implement construction programs."¹⁰¹ To the extent Sprint and T-Mobile are concerned about towers not located along existing networks, the Commission's findings regarding greenfield markets apply. In these situations, the incumbent LEC has no advantage whatsoever stemming from its past provision of service; if Sprint, T-Mobile, or other providers are in need of facilities to carry their traffic, they are free to provision those facilities themselves, and can do so on terms no worse than those available to Qwest or other incumbents.

¹⁰⁰ See Sprint Nextel Comments at 12 ("[T]he fact that a firm has deployed an alternative facility between two BOC offices says virtually nothing about the prospects for the construction of a competitive channel between a specific cell site and a specific central office."); T-Mobile Comments at 8 (observing that "cellular base stations frequently cannot be located in large, telecom-intensive buildings"); *id.* at 11.

¹⁰¹ *TRO*, 18 FCC Rcd at 17143 ¶ 275. Just like Sprint Nextel, Qwest in these circumstances faces the "cost of infrastructure, zoning and rights-of-way complications, [and] the difficulty in digging up streets and sidewalks." Sprint Nextel Comments at 31.

Second, to the extent Sprint and T-Mobile are concerned about links to incumbent LEC central offices,¹⁰² the Commission has also found that such “entrance facilities” are particularly susceptible to competitive replication. As Qwest explained in its opening comments, Commission has found that links connecting two providers’ networks “are less costly to build, are more widely available from alternative providers, and have greater revenue potential than dedicated transport between incumbent LEC central offices” than other transport links, and are therefore subject to self-provision or third-party procurement.¹⁰³ Here too, then, there is no reason to subject incumbent LECs to unique regulatory burdens.

V. THE HIGH-CAPACITY TRANSMISSION MARKET IS COMPETITIVE AND BECOMING MORE SO.

Ultimately, the questions presented in this docket are questions about market structure. On this issue, parties advocating pervasive regulation present many allegations but conspicuously little evidence. This is unsurprising. As described in Qwest’s initial comments, and the comments of other parties, the market is highly competitive, and is poised to become dramatically more so. Qwest [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED] [END CONFIDENTIAL] belying assertions that the market lacks competition. The market includes facilities-based wireline providers; wireline providers relying in whole or in part on incumbent LEC facilities, often procured at extremely low TELRIC rates; and – increasingly – intermodal providers largely bypassing the incumbent’s network. Because this evidence is so central to this proceeding, Qwest summarizes the relevant legal principles and recites the key facts below.

¹⁰² See T-Mobile Comments at 11; Sprint Nextel Comments at 12-13.

¹⁰³ See *TRRO*, 20 FCC Rcd at 2610 ¶ 138; Qwest Comments at 19.

A. Legal Framework

As Qwest explained at greater length in its opening comments, the Commission should in this docket remain faithful to the principles of market assessment that it has elucidated in various recent orders.¹⁰⁴

First, the Commission’s analysis of the market must account not only for traditional dedicated wireline facilities, but also for “intermodal” offerings – *i.e.*, for point-to-point services offered via other platforms and for the xDSL offerings that are increasingly relied on by small enterprise customers. In decision after decision, courts and the Commission have recognized that product markets must be defined in a technologically neutral manner that does not privilege any platform over another platform offering similar functionality. “[T]he Act,” as the Commission has stated, “expresses no preference for the technology that carriers should use to compete.”¹⁰⁵ The courts have repeatedly agreed.¹⁰⁶ Moreover, as explained in Qwest’s opening comments, this approach tracks the framework employed by the Department of Justice and the Federal Trade Commission in their market analyses.¹⁰⁷

¹⁰⁴ See Qwest Comments at 4-19.

¹⁰⁵ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 18 FCC Rcd 16978, 17045 ¶ 97 (2003) (“TRO”), *aff’d in part, remanded in part, vacated in part*, *United States Telecom Ass’n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004), *cert. denied sub nom. Nat’l Ass’n. of Regulatory Util. Comm’rs v. United States Telecom Ass’n*, 125 S. Ct. 313 (2004).

¹⁰⁶ See *USTA I*, 290 F.3d at 428-29; *USTA II*, 359 F.3d at 572-73.

¹⁰⁷ As stated in the Horizontal Merger Guidelines jointly produced by these agencies, “[m]arket definition focuses solely on demand substitution factors – *i.e.*, possible consumer responses” to a change in prices. HORIZONTAL MERGER GUIDELINES § 1.0 (U.S. Department of Justice & Federal Trade Commission April 2, 1992, rev. April 8, 1997).

Second, the Commission must account for the feasibility of competitive deployment. As mentioned above, the Commission has found that the facilities used to connect one network to another network – so-called “entrance facilities” – can feasibly be replicated by competitors. Similarly, the Commission has determined that competitors are able to surmount any barriers to the deployment of OCn-capacity loops and transport links. “[S]ervices offered over OCn loops produce revenue levels which can justify the high cost of loop construction, providing the opportunity for [competitors] to offset the fixed and sunk costs associated with the loop construction.”¹⁰⁸ These findings largely mirrored the Commission’s conclusions with regard to “residential” broadband services, where high revenue opportunities were again expected to enable competitive deployment.¹⁰⁹

Third, the Commission must account for potential, as well as existing, competition. As the Commission has recognized in the special access context and elsewhere, existing deployment demonstrates that other competitors can feasibly enter a market, and that providers are able to enter other, similar, markets. Thus, the *TRRO* relied heavily on an approach that “account[ed] for actual and potential deployment by inferring from competitors’ facilities deployment in one market the ability of a reasonably efficient competitor to enter another, similar market in an economic manner.”¹¹⁰ Similarly, the recent wireline merger orders have expressly relied on inferences regarding the potential for future special access competition based on existing

¹⁰⁸ *TRO*, 18 FCC Rcd at 17169 ¶ 316.

¹⁰⁹ *See id.* at 17133-34 ¶ 258.

¹¹⁰ *TRRO*, 20 FCC Rcd at 2558-59 ¶ 43.

deployment.¹¹¹ In rapidly expanding high-capacity markets, the Commission has found that it must also account for incipient competition: In the *Broadband 271 Forbearance Order* and the *Wireline Broadband Order*, respectively, the Commission relied explicitly on “potential” competition,¹¹² and rejected arguments that the broadband market must be assessed solely on the basis of existing competition.¹¹³ A market in the midst of substantial growth, the Commission observed, “is more appropriately analyzed in view of larger trends in the marketplace, rather than exclusively through the snapshot data that may quickly and predictably be rendered obsolete as [the] market continues to evolve.”¹¹⁴

Fourth, the Commission must account for the pernicious effects of unnecessary economic regulation. The Commission has repeatedly explained that “rate regulation can only be, at best, an imperfect substitute for market forces,”¹¹⁵ because it “cannot replicate the complex and dynamic ways in which competition will affect the prices, service offerings, and investment

¹¹¹ See *AT&T Inc. and BellSouth Corporation, Application for Transfer of Control*, 22 FCC Rcd 5662, 18313 ¶ 51 (2007) (“*AT&T/BellSouth Merger Order*”); *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, 20 FCC Rcd 18290, 5687 ¶ 44 (2005) (“*SBC/AT&T Merger Order*”); *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, 20 FCC Rcd 18433, 18455 ¶ 44 (2005) (“*Verizon/MCI Merger Order*”).

¹¹² *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*; *SBC Communications Inc.’s Petition for Forbearance Under 47 U.S.C. § 160(c)*; *Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c)*; *BellSouth Telecommunications, Inc., Petition for Forbearance Under 47 U.S.C. § 160(c)*, 19 FCC Rcd 21496, 21505 ¶ 21 (2004) (“*Broadband 271 Forbearance Order*”); *id.* at 21505-06 ¶ 22. In the course of upholding the *Broadband 271 Forbearance Order*, the D.C. Circuit affirmed the Commission’s conclusion that reliance on potential competition was appropriate. See *EarthLink, Inc. v. FCC*, 462 F.3d 1, 11 (D.C. Cir. 2006).

¹¹³ See *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853, 14880-81 ¶ 50 (2005) (“*Wireline Broadband Order*”).

¹¹⁴ *Id.*

¹¹⁵ *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing End User Common Line Charges*, 12 FCC Rcd 15982, 16106-07 ¶ 289 (1997) (emphasis added).

decisions of both incumbent LECs and their competitors.”¹¹⁶ Regulated rates invariably fail to replicate those that would prevail in a competitive market, providing inefficient signals to incumbents, competitors, and their customers. When rates are set too low, they deter efficient investment, undermining the long-term prospects for facilities-based competition. This is especially true of markets like that for high-capacity transmission, which enjoy competition from many different providers and have witnessed falling prices. Thus, the Commission has recognized that, “[l]ike all price regulation, the Commission’s price cap system is an imperfect substitute for actual competition,” and “should continue only until competition emerges in the interstate access market.”¹¹⁷

B. Current State of Competition

As described more fully in Qwest’s opening comments, the high-capacity transmission market, viewed in the context of the legal framework described above, is vibrantly competitive. Active wireline and intermodal providers are successfully challenging Qwest and other incumbents for business in this market, and have captured very substantial market shares, refuting any need to re-impose pervasive price-cap regulation..

1. Wireline Competition.

As the record makes clear, wireline competition in the high-capacity transmission market is intense nation-wide, and particularly in Qwest’s fourteen-state region. Parties seeking the re-institution of universal price-cap regulation offer vague and unsupported descriptions of a market

¹¹⁶ *Id.*

¹¹⁷ *Price Cap Performance Review for Local Exchange Carriers; Treatment of Operator Services Under Price Cap Regulation; Revisions to Price Cap Rules for AT&T*, 11 FCC Rcd 858, 869-70 ¶ 21 (1995).

lacking any significant competition.¹¹⁸ Third-party data compiled by disinterested parties, however, tell a much different story. Nationwide, 92,492 buildings were “lit” at the close of 2006, with more than 23,300 of those buildings having been “lit” between 2003 and 2006.¹¹⁹ At least 72 percent of office buildings housing more than 250 workers are connected to fiber-optic facilities, and the growth rate is high in commercial buildings of all sizes.¹²⁰ “With over 45 [wireline] competitors, the degree of competition within the wholesale private line market is highly intense,” and “[t]he local access market has a degree of competition which is even more intense.”¹²¹ Under these circumstances, it is impossible to credit undocumented claims such as Ad Hoc’s assertion that “large enterprise customers at virtually all commercial locations have no access options other than the services and facilities available from ILECs.”¹²²

Furthermore, there is no sign that fiber deployment is stalling. Between 2003 and 2006, deployment by telephone companies quadrupled.¹²³ In 2006 alone, wireline providers deployed

¹¹⁸ See, e.g., XO et al. Comments at 12 (stating without support that competitors “lack competitive alternatives in most areas”); id. at 30 (asserting “short supply” of competitive alternatives) Paetec Comments at 15 (citing undocumented “paucity of alternative special access service providers”); T-Mobile Comments at 7 (“T-Mobile has few alternatives to the ILECs’ special access services.”).

¹¹⁹ *U.S. Business: Change in Fiber Availability - 2003 vs. 2006*, Vertical Systems Group 2006. Used with permission from Vertical Systems Group, Inc. Copyright 2007. All rights reserved.

¹²⁰ *Id.*

¹²¹ Frost & Sullivan, *North American Wholesale Private Line Services* at 1-28 (2007) (“Frost & Sullivan”).

¹²² Ad Hoc Comments at 9.

¹²³ *KMI Research, a division of CRU Group* (www.crugroup.com), as published in TIA’s 2007 *Telecommunications Market Review and Forecast* at 94.

9.7 million miles of fiber.¹²⁴ The Telecommunications Industry Association, moreover, expects that fiber deployment will grow by about 7.2 percent per year between 2007 and 2010.¹²⁵

With respect to Qwest's region, data reflecting Harte Hanks' interviews with high-capacity end users revealed particularly high levels of competitive penetration among surveyed users. [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [END

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Of course, competition is not limited to the retail enterprise market, but extends deep into the wholesale market as well. Whatever effect the Verizon/MCI, SBC/AT&T, and

¹²⁴ See *id.* According to the Commission's statistics, the number of residential customers receiving fiber-based broadband has skyrocketed, from 111,386 subscribers in 2003 to 700,083 subscribers – 628 percent as many – in June 2006. Report, *High-Speed Services for Internet Access: Status as of June 30, 2003*, Industry Analysis and Technology Division, Wireline Competition Bureau, FCC, at Table 1 (rel. Dec. 2003); Report, *High-Speed Services for Internet Access: Status as of June 30, 2006*, Industry Analysis and Technology Division, Wireline Competition Bureau, FCC, at Table 1 (rel. Jan. 2007).

¹²⁵ See Telecommunications Industry Association, TIA'S 2007 TELECOMMUNICATIONS MARKET REVIEW AND FORECAST 95 (2007).

¹²⁶ See Qwest Comments at 22-23.

AT&T/BellSouth mergers may have had elsewhere, they did not remove any competitors from Qwest's region. Indeed, as described above, those mergers if anything strengthened the competition Qwest faced from legacy AT&T and MCI.¹²⁷ AT&T, for example, specifically markets its experience in targeting wholesale customers in Qwest's region. But wholesale competition in Qwest's region is not limited to Bell affiliates. As described in detail in Qwest's initial comments, Qwest faces wholesale competition from a plethora of wireline providers, including (but not limited to) Covad, XO, Level 3, Time Warner Telecom, Adesta, Integra/Electric Lightwave, Onvoy, Global Crossing, and SRP Telecom.¹²⁸

Data from GeoTel, moreover, demonstrate that much of this retail and wholesale competition relies in whole or in part on competitive fiber. As demonstrated in the following chart, competitors have deployed aggressively in numerous Qwest service areas:¹²⁹

¹²⁷ See *supra* Part III.

¹²⁸ See Qwest Comments at 24. See also Verizon Comments at 19-20.

¹²⁹ This chart is based on data submitted with Qwest's opening comments. See *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Colorado Metropolitan Statistical Area*, WC Docket No. 07-97, Declaration of Robert H. Brigham and David L. Teitzel (filed Apr. 27, 2007) at ¶¶ 10, 34 (“*Denver Declaration*”) (appended to Qwest Comments as Exhibit 2); Letter from Melissa E. Newman, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 (Aug. 3, 2007) (supplying Erratum to *Denver Declaration*) (appended to Qwest Comments as Exhibit 3); *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, WC Docket No. 07-97, Declaration of Robert H. Brigham and David L. Teitzel (filed Apr. 27, 2007) at ¶¶ 10, 34 (“*Phoenix Declaration*”) (appended to Qwest Comments as Exhibit 4); *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Seattle, Washington Metropolitan Statistical Area*, WC Docket No. 07-97, Declaration of Robert H. Brigham and David L. Teitzel (filed Apr. 27, 2007) at ¶¶ 10, 37 (“*Seattle Declaration*”) (appended to Qwest Comments as Exhibit 5); Letter from Melissa E. Newman, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 (Aug. 3, 2007) (supplying Erratum to *Seattle Declaration*) (appended to Qwest Comments as Exhibit 6); *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Minneapolis-St. Paul, Minnesota Metropolitan Statistical Area*, WC Docket No. 07-97, Declaration of Robert H. Brigham and David L. Teitzel (filed Apr. 27, 2007) at ¶¶ 10, 37 (“*Minneapolis-St. Paul Declaration*”) (appended to Qwest Comments as Exhibit 7).

[BEGIN CONFIDENTIAL]

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This chart demonstrates that facilities-based competition is already robust in Qwest's region. This competition will only grow as time goes on.

Moreover, Qwest is hardly alone; incumbents of all sizes are facing facilities-based competition. Verizon states its top 25 MSA are home to an average of nine competitive fiber providers each.¹³⁰ AT&T reports that [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] of its demand for both DS1 and DS3 circuits in numerous MSAs is either already connected to competitive facilities or within about three blocks of such facilities.¹³¹ Embarq notes that “[a]t least 10 competitive special access providers are present in four of [its] largest markets,” and that “[m]ost of [its] markets have 5 competitors.”¹³² Iowa

¹³⁰ See Verizon Comments at 15.

¹³¹ AT&T Comments at 11.

¹³² Embarq Comments at 5.

Telecommunications Services, Inc. describes competition it faces from multiple wholesalers using various platforms.¹³³

Moreover, the Commission cannot ignore the widespread availability of high-capacity UNEs in Qwest's territory as it evaluates the market. Wireline competitors are providing service throughout Qwest's region using DS1- and DS3-capacity loops and transport links acquired at TELRIC prices under section 251(c)(3) of the Act. Indeed, only about [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] percent of Qwest's wire centers are currently subject to any high-capacity loop or transport unbundling relief under the framework set forth in the *TRRO*. Region-wide, Qwest provides [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] unbundled high-capacity loops to [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] and [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] high-capacity transport links to [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] competitive LECs.¹³⁴ The Commission has recognized that this competition is relevant to the instant proceeding, because "the availability of UNEs is itself a check on special access pricing[.]"¹³⁵ This pressure is not in the least hypothetical: XO et al. observe that "XO ... currently uses alternative loop access providers for only a small part of its needs,"¹³⁶ but neglects to mention the reason why: [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL]

¹³³ Iowa Telecommunications Comments at 20-21.

¹³⁴ See Qwest Comments at 28.

¹³⁵ *TRRO*, 20 FCC Rcd at 2574 ¶ 65.

¹³⁶ XO et al. Comments at 24.

[END CONFIDENTIAL]

Finally, as noted in Qwest’s initial comments, any analysis of the high-capacity wireline transmission market must also account for xDSL offerings, which in many cases are substitutes for DS1 links.¹³⁷ xDSL speeds have risen significantly in recent years, and in most cases surpass the 1.54 Mbps offered by a DS1 circuit.¹³⁸ As a result, this traditionally “residential” offering can now meet the needs of many small and medium-sized businesses at costs far below those associated with high-capacity TDM links. Qwest and its competitors are currently providing xDSL services broadly within Qwest’s territory over facilities that are deployed to over 80 percent of the customers in Qwest’s region and available as UNEs in almost every one of Qwest’s 1,200 or so wire centers.¹³⁹ These facts simply contradict claims that there exist no feasible alternatives to incumbent LECs’ DS1 offerings.¹⁴⁰

In short, claims that retail and wholesale markets for high-capacity transmission service are bereft of competitive wireline providers simply do not accord with the facts on the ground, and must be rejected.

¹³⁷ See, e.g., Cogan Decl. at ¶ 4.

¹³⁸ See Qwest Comments at 24 n.62 (describing xDSL speeds ranging from 3 MBps to 25 MBps). See also Sprint Nextel Comments at 23 (“DSL service provides speeds comparable to a DS1.”)

¹³⁹ Qwest has won relief from its obligation to unbundle DS0 loops pursuant to section 251(c)(3) in a handful of its wire centers within the Omaha MSA, but still faces a mandate to provide access to these facilities at “just and reasonable” rates and terms under section 271. See *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, 20 FCC Rcd 19415, 19417 ¶ 2 (2005), *aff’d*, *Qwest Corp. v. FCC*, 482 F.3d 471 (D.C. Cir. 2007).

¹⁴⁰ See, e.g., XO et al. Comments at 3. In light of the substitutability of DS1 and xDSL offerings, allegations relying on DS1 rates without any reference to xDSL rates have no merit and should be rejected. See, e.g., Ad Hoc Comments at 12.

2. Intermodal Competition.

Of at least equal importance, competitors using non-wireline platforms are making significant inroads into the high-capacity transmission market and are poised to make even more substantial gains. As described above, these intermodal offerings must be accounted for in any evaluation of this market's competitiveness.

a. Wireless

As described in Qwest's initial comments, the market for wireless transmission service has blossomed since the Commission last sought comment in this docket.¹⁴¹ This technology is expected to become especially important in the backhaul of retail wireless traffic: "Roughly 20% of mobile base stations in the United States are backhauled via wireless technologies today," whereas "globally 65% of mobile base stations are linked via wireless backhaul."¹⁴² Thus, observers "see the number of base stations in the US using wireless for backhaul almost doubling by 2011 to help provide this higher backhaul capacity."¹⁴³ This expansion will be fueled by the transition from 2G wireless services to 3G and 4G services,¹⁴⁴ which will be accompanied by growth in both capacity needs *and* retail revenues. Moreover, it has already

¹⁴¹ To the extent commenters argue that fixed wireless offerings should not be accounted for because they have not yet been ubiquitously deployed, *see, e.g.,* ATX et al. Comments at 3 n.2, they badly misunderstand the market-analysis precepts discussed in Part I, *supra*. What matters here is that fixed wireless providers have both the will and the means to compete for traffic, and to do so at costs that are very likely below those of the incumbent LEC. Under those circumstances, the fact that a fixed wireless operator has not yet deployed in a particular geographic market is beside the point from the perspective of public policy.

¹⁴² Visant Strategies, *US Mobile Backhaul: Evolving Market 2007*, available at <<http://www.visantstrategies.com/Prback2007.html>>.

¹⁴³ *Id.*

¹⁴⁴ *See generally* Infonetics Research, *Service Provider Plans for Next Gen Mobile and Wireless Broadband: North America, Europe, and Asia Pacific 2007* (Mar. 2007) ("Infonetics").

begun: AT&T reports that AT&T Mobility has already purchased [BEGIN CONFIDENTIAL]
[REDACTED] [END CONFIDENTIAL] for use in backhauling traffic.¹⁴⁵

Microwave. Various operators using millimeter-wave spectrum in the Local Multipoint Distribution Service (“LMDS”) and other bands have made significant strides in recent years, creating effective alternatives to DS1, DS3, OCn and Ethernet transmission offerings. These offerings are easy to deploy, and are better suited to scalable modular deployment than traditional wireline offerings.¹⁴⁶

Multiple providers are using microwave technology to compete against high-capacity wireline transmission. FiberTower is “entirely focused on designing, deploying and operating facilities-based backhaul networks to deliver superior network quality for major wireless carriers,”¹⁴⁷ and holds licenses for spectrum covering 99 percent of the United States. A November 2006 Wall Street presentation indicated that the company was already carrying about 5,000 T1 equivalents.¹⁴⁸ The company now has agreements with six of the eight largest mobile wireless operators, including Sprint Nextel¹⁴⁹ and T-Mobile.¹⁵⁰ According to AT&T, [BEGIN CONFIDENTIAL] [REDACTED]

¹⁴⁵ See AT&T Comments at 16.

¹⁴⁶ See, e.g., *id.* at 57.

¹⁴⁷ FiberTower Corp., *Designing Superior Backhaul Networks*, available at <<http://www.fibertower.com/corp/solutions-backhaul.shtml>>.

¹⁴⁸ FiberTower Corp., Presentation, JP Morgan 2007 Small/Mid Cap Conference, Nov. 15, 2006, available at <http://www.fibertower.com/corp/downloads/investors/Investor_Presentation_111306_JPM.ppt>.

¹⁴⁹ FiberTower Corp., FiberTower Corp. Form 10-Q for the period ending March 31, 2007 at 20, available at <<http://www.fibertower.com/corp/downloads/investors/quarterly10Q/10Q-03-07.pdf>>.

¹⁵⁰ See Olga Kharif, *Sprint's Secret to Cost Cutting: WiMAX*, BusinessWeek (Dec. 27, 2006), available at <http://www.businessweek.com/technology/content/dec2006/tc20061227_904530.htm?campaign_id=rss_tech> (“*Sprint's Secret*”).

[REDACTED] [END CONFIDENTIAL], and Verizon Wireless is already using such offerings outside the Verizon region.¹⁵¹ FiberTower also makes its spectrum available for lease to service providers wishing to construct their own backhaul networks.¹⁵² Nextlink (an affiliate of XO Communications, Inc.), provides a “highly scalable, alternative access solution to support bandwidth-intensive, next-generation mobility applications and content, as well as a cost-effective ‘last-mile’ replacement of local telephone company offerings.”¹⁵³ Its offering provides service at capacities ranging from the DS1 level to the OC3 level.¹⁵⁴ Nextlink only began offering this service in six markets in mid-2006,¹⁵⁵ but by July of this year it had already expanded to 37 operating markets.¹⁵⁶ Another provider, Telecom Transport Management, Inc. (“TTM”), “markets microwave transport services to mobile wireless carriers as a competitive alternative to landline facilities for carrying voice and data traffic from cell sites to mobile switching centers or other points of presence (‘microwave backhaul’).”¹⁵⁷

¹⁵¹ See AT&T Comments at 17.

¹⁵² See FiberTower Corp., *Solutions: Spectrum Leasing*, available at <<http://www.fibertower.com/corp/solutions-spectrum.shtml>>. See generally Verizon Comments at 23-24.

¹⁵³ Nextlink, *Wireless Metro Ethernet Services*, available at <http://www.nextlink.com/pdf/Wireless_Metro_Ethernet.pdf>.

¹⁵⁴ See Carol Wilson, *XO Expands Broadband Wireless Coverage to 36 Markets*, TELEPHONY ONLINE, July 11, 2007, available at <<http://money.cnn.com/news/newsfeeds/articles/prnewswire/NEW02711072007-1.htm>>; Kelly Hill, *XO Expands Footprint*, RCRWIRELESS NEWS, July 11, 2007 (“*XO Expands Footprint*”).

¹⁵⁵ Yuki Noguchi, *XO Ready to Revive Fixed-Wireless Technology*, WASHINGTON POST, Apr. 24, 2006, at D2, available at <<http://www.washingtonpost.com/wp-dyn/content/article/2006/04/23/AR2006042300881.html>>.

¹⁵⁶ Nextlink, *Nextlink Expands Broadband Wireless Networks Nationwide*, available at <http://www.nextlink.com/news_70.htm>.

¹⁵⁷ Comments of Telecom Transport Management, Inc., *Amendment of Part 101 of the Commission's Rules to Modify Antenna Requirements for the 10.7-11.7 GHz Band*, WT Docket No. 07-54, RM-11042, at 1-2 (filed May 25, 2007).

WiMAX. Other operators, relying on WiMAX technology using the 2.5 GHz Broadband Radio Service (“BRS”) band, are also beginning to challenge wireline providers in the high-capacity transmission market. Notably, Sprint Nextel has extensive holdings in the BRS band, covering 85 percent of the country.¹⁵⁸ Last month, the company announced that it would team with ClearWire to create a joint WiMAX network using their combined spectrum holdings.¹⁵⁹ Sprint has expressed its intention to use that spectrum to eliminate its reliance on wireline special access offerings – a strategy expected to afford the company a significant competitive advantage: “By using WiMAX [to transmit communications from the cell tower to the switching station] Sprint Nextel could cut network operating costs by two-thirds.”¹⁶⁰ Facilities-based provider TowerStream uses WiMAX to provide retail service to business users at speeds ranging from 1.5 Mbps to 1,000 Mbps in nine markets across the United States.¹⁶¹ Covad Communications, moreover, now “offer[s] businesses T1-class wireless broadband that delivers fast, symmetrical downstream and upstream speeds,” providing “businesses a powerful alternative to standard T1 services,” at speeds of up to 100 Mbps.¹⁶²

¹⁵⁸ See Sprint Nextel, *Sprint Nextel and Clearwire to Partner to Accelerate and Expand the Deployment of the First Nationwide Mobile Broadband Network Using WiMAX Technology*, available at <http://www2.sprint.com/mr/news_dtl.do?id=17520> (“Sprint/Clearwire Announcement”); see also *Sprint’s Secret*; Verizon Comments at 24-25.

¹⁵⁹ See *Sprint/Clearwire Announcement*.

¹⁶⁰ *Sprint’s Secret*.

¹⁶¹ See TowerStream, *Small Business*, available at <<http://www.towerstream.com/content.asp?smallbusiness>>; TowerStream, *Medium Business*, available at <<http://www.towerstream.com/content.asp?mediumbusiness>>; TowerStream, *Enterprise*, available at <<http://www.towerstream.com/content.asp?enterprise>>; TowerStream, *Service Areas*, available at <<http://www.towerstream.com/content.asp?serviceareas>>.

¹⁶² See Covad Wireless Services: *T1-Class Wireless Broadband Services for Business*, available at <<http://www.covad.com/web/services/wireless/index.html>>.

b. Cable

Contrary to the claims of some commenters, cable competition has also made its way to the enterprise and wholesale high-capacity transmission markets. Cable operators generally own relatively ubiquitous networks, which cover not only residential areas but also hotels and large office buildings in urban business districts. They now use these facilities to offer many varieties of business-grade telephone, internet, and video services using their existing fiber and coaxial plant.¹⁶³ AT&T notes that even as of 2005, it was the case that [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] of all retail DS1 circuits it had lost to competitors were lost to cable providers.¹⁶⁴

In Qwest's region, multi-system operators Cox Communications and Comcast are increasingly contesting markets previously served by wireline providers. Notwithstanding competitors' claims that "[c]able television systems ... have not developed in a manner that allows them to serve as alternatives for widespread deployment of DS-1 or DS-3 loop facilities,"¹⁶⁵ both companies are offering enterprise-grade service, and working hard to expand those offerings. Cox offers "Cox Private Line" transport services directly to enterprise users at bandwidths ranging from a single DS1 (1.544 Mbps) to OC-192 (9.6 Gbps).¹⁶⁶ Its offerings are

¹⁶³ See, e.g., *Comcast Workplace*, available at <http://www.comcast.com/corporate/shop/business/comcast_workplace.html>; *Cox Long Distance and Toll Free*, available at <<http://www.coxbusiness.com/products/voice/longdistance.html>>; *Cox Dedicated Long Distance and Dedicated Toll Free*, available at <<http://www.coxbusiness.com/products/voice/dedicatedlongdistance.html>>.

¹⁶⁴ See AT&T Comments at 18.

¹⁶⁵ XO et al. Comments at 25.

¹⁶⁶ See *Cox Private Line*, available at <http://www.coxbusiness.com/pdfs/CBS40200-PrvtLn_DS0605.pdf>. Some commenters appear to acknowledge that Cox is providing significant competition in the enterprise market. See, e.g., Time Warner/One Comments at 16.

scalable, and can be channelized to facilitate service to smaller end users.¹⁶⁷ Comcast offers a wide range of products for the enterprise and wholesale markets within Qwest's region.¹⁶⁸ Last year, Comcast announced its intention to "leverage [its] unparalleled network to deliver video, voice and data services for the business marketplace."¹⁶⁹ Comcast plans to invest \$250 million in 2007 and \$3 billion over five years to expand and improve its enterprise market services.¹⁷⁰ The company also has begun to offer wholesale transmission "that can reach into new markets and scale at a moment's notice," and "can be deployed quickly and efficiently with minimal wait and bureaucracy."¹⁷¹ As should be clear, claims that "cable companies largely target the smallest of small business customers"¹⁷² are badly dated, and no longer reflect competitive realities.

Like the wireless providers discussed above, cable operators are expected to have an especially significant impact in the market for backhaul of wireless traffic. Indeed, many believe that the "cable industry has a 'clear advantage' over the telcos to provide cell backhaul

¹⁶⁷ See *Cox Carrier Access*, available at <http://www.coxbusiness.com/pdfs/cox_carrier.pdf>; *Cox Private Line*.

¹⁶⁸ ATX et al. claim that "[c]able operators do not offer wholesale access," but this claim is simply false. ATX et al. Comments at 3. Time Warner and One Communications argue that because they utilize fiber-based TDM and Ethernet connectivity, high-capacity cable offerings "cannot be considered 'intermodal' competition." Time Warner/One Comments at 15. What one calls this competition is immaterial: As Time Warner and One appear to concede, cable operators are providing a facilities-based alternative of incumbent LEC networks.

¹⁶⁹ See *Minneapolis-St. Paul Declaration* at ¶ 18.

¹⁷⁰ See *id.*

¹⁷¹ See *Denver Declaration* at ¶ 51; *Seattle Declaration* at ¶ 53; *Minneapolis-St. Paul Declaration* at ¶ 55. See also Verizon Comments at 21-23 (describing similar competition from Cablevision); Embarq Comments at 5.

¹⁷² Time Warner/One Comments at 16.

services.”¹⁷³ As described in Qwest’s initial comments, cable providers have already begun to serve this market segment.¹⁷⁴

As noted above, moreover, broadband offerings traditionally thought of as suitable mostly in the residential market are seeing more and more use as substitutes for DS1 service. This is as true for cable modem offerings as for DSL offerings. Cable operators now generally offer speeds exceeding 5 Mbps, significantly higher than a DS1 link’s 1.54 Mbps. As commenters seeking increased regulation acknowledge, these offerings are available at prices far below those associated with wireline offerings of equal capacity.¹⁷⁵ The availability of low-cost, high-speed cable modem services has played, and will continue to play, a substantial role in policing last-mile high-capacity transmission prices.

C. Future Trends.

Finally, as Qwest explained in its opening comments, trends in the high-capacity transmission market favor increasing capacity needs and therefore increasing efficiencies. These trends will ensure that even more competitors enter the market, enhancing quality and keeping prices low. As one observer notes, “[o]perators are looking at alternative technologies, hoping to expand backhaul bandwidth using technologies that are either cheaper or provide more bandwidth [than wireline DS1s and DS3s].”¹⁷⁶ Thus, even if it is true today that “[o]nly the very

¹⁷³ *Cable Has Prime Cellular Backhaul Opportunity: Best Positioned, Suggests New Study*, BroadbandReports.com (Oct. 20, 2006).

¹⁷⁴ See Qwest Comments at 35-39, 57.

¹⁷⁵ See, e.g., Time Warner/One Comments at 15-16.

¹⁷⁶ *Infonetics* at 56.

largest customers need three DS-3s worth of capacity,” that is unlikely to be true for much longer.¹⁷⁷

Here too, the trends are likely to have the most momentous impact on the backhaul of wireless traffic. Stratecast predicts that the U.S. wireless backhaul market will almost double between 2006 and 2010, from \$3.1 billion to \$5.9 billion,¹⁷⁸ while FiberTower expects the backhaul market to grow to \$10.1 billion over that period.¹⁷⁹ The initial comments confirm these trends: T-Mobile, for example, acknowledges that capacity needs will grow “as wireless providers deploy 3G and more advanced services, which require substantially more backhaul than earlier generations of wireless service.”¹⁸⁰

As the market grows, legacy transmission technologies will be replaced by more efficient alternatives, including – but not limited to – those described above. Furthermore, as capacity needs increase, so too will subscriber revenues, providing the fuel for investment in next-generation transmission networks. According to Stratecast, multimedia wireless subscriber revenues increased by about three times between 2004 and 2006 alone,¹⁸¹ and wireless data subscriber revenues can be expected to rise from about \$14.2 billion in 2006 to about \$36.7 billion in 2010.¹⁸²

¹⁷⁷ XO et al. Comments at 23.

¹⁷⁸ Stratecast, *Multi-media Wireless Backhaul: A Cable Operator Opportunity?* 10 (May 2007) (“*Stratecast Backhaul*”).

¹⁷⁹ FiberTower Corporation, JPMorgan 2006 Small/Mid Cap Conference Presentation at 8 (Nov. 15, 2006).

¹⁸⁰ T-Mobile Comments at 8.

¹⁸¹ *Stratecast Backhaul* at 7.

¹⁸² *Id.* at 8.

Thus, ballooning capacity needs are forcing providers to shift to more efficient networks offering greater revenue opportunities, rendering competitive deployment even more feasible than it had been before. At the same time, the end-user services giving rise to these capacity demands will continue to provide carriers with substantial revenue streams, permitting investment in new network technologies.

* * *

In sum, the wireline high-capacity transmission market is intensely competitive. In its region, Qwest controls only [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] of DS1 and DS3 circuits provided to surveyed end users. Much of that competition relies on facilities not owned by Qwest. In addition, Qwest increasingly faces strong competition from intermodal providers relying on wireless, cable, and other platforms. Other incumbent LECs face similar competition. Under these conditions, allegations of market power simply cannot stand.¹⁸³

CONCLUSION

For the reasons described herein and in Qwest's initial comments, the Commission should reject calls for the re-imposition of price cap regulation of special access services. The market for high-capacity transmission is extremely competitive, and is becoming more so. Moreover, that market reveals no evidence of supracompetitive prices or profits, notwithstanding commenters' contrived efforts to demonstrate otherwise. Furthermore, discount packages of the

¹⁸³ See, e.g., *Blue Cross & Blue Shield*, 65 F.3d at 1411 (citing *United States v. Rockford Memorial Corp.*, 898 F.2d 1278, 1285 (7th Cir. 1990); *Fineman v. Armstrong World Industries, Inc.*, 980 F.2d 171, 201-02 (3d Cir. 1992); *Colorado Interstate Gas Co. v. Natural Gas Pipeline Co.*, 885 F.2d 683, 694 n. 18 (10th Cir. 1989); *United States v. Aluminum Co. of America*, 148 F.2d 416, 424 (2d Cir. 1945)) (stating that "50 percent is below any accepted benchmark for inferring monopoly power from market share").

sort offered by incumbents in this market are pro-competitive, as recognized by the leading antitrust authorities. Finally, other assorted arguments raised by commenters may quickly be dismissed. Given the above, the Commission should retain the basic pricing flexibility regime, but – as described in Qwest's initial comments – should afford immediate Phase I relief in all markets and Phase II relief with respect to all OCn-capacity and packet-switched services.

Respectfully Submitted,

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